BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCISCO ONTIVEROS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,372
WILDCAT CONSTRUCTION COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the December 10, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was denied benefits after the ALJ determined that claimant had failed to provide respondent with timely notice of accident and claimant failed to establish just cause for that failure sufficient to enlarge the notice period to seventy-five days.

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Francisco Ontiveros taken on August 24, 2010; the transcript of Preliminary Hearing held November 30, 2010; and the documents filed of record in this matter.

ISSUES

1. Did claimant provide timely notice of his alleged accident? Claimant alleges he told Harold Katz, Jr., respondent's project supervisor, of his developing right upper extremity problems. Mr. Katz denies knowing of any physical problems until respondent received claimant's attorney's letter on June 28, 2010.

2. If claimant failed to provide timely notice of his alleged accident, was there just cause for that failure?

3. What is the date of accident in this matter? Claimant contends the date of accident is controlled by K.S.A. 2009 Supp. 44-508(d). Respondent contends the recent Supreme Court case of *Mitchell*[1] restricts K.S.A. 2009 Supp. 44-508(d) to no later than the last day worked. The ALJ made no date of accident determination in this matter.[2]

FINDINGS OF FACT

Claimant had worked as a laborer for respondent for about two years. He testified that he began experiencing pain in his right hand, arm and shoulder beginning about two months before his termination on May 24, 2010. Claimant worked as a laborer performing various jobs, including running a jackhammer, running equipment, carpentry work and other manual labor jobs. Claimant would be picked up for work by a co-worker named Guadalupe Sabas in a company truck.

Claimant testified that approximately two months before his termination, he began experiencing pain in his right upper extremity, including his right hand, arm and shoulder. Claimant testified that he told Mr. Sabas of the problems and Mr. Sabas told Harold Katz, Jr., respondent's project supervisor. Claimant also alleged that his condition worsened and he advised Mr. Katz of the problems. Claimant stated that he continued to perform his job duties until his termination.

Mr. Katz stated that claimant did not tell him of right upper extremity problems and no medical treatment was ever requested. Mr. Katz kept a diary of the workers and their schedules. His diary showed claimant as being a no-show on May 7, 2010, May 17, 2010, and May 22, 2010. Claimant's girlfriend called Mr. Katz on May 18 and stated that claimant was going to the emergency room with stomach pains.

Mr. Katz testified that he had been having problems with the workers missing work due to excessive drinking. On May 15 and May 22, Mr. Sabas appeared at claimant's house to take him to work. However, claimant did not answer the door. After claimant's failure to appear at work on May 22, 2010, claimant's employment with respondent

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[1] *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

[2] At the preliminary hearing in this matter, respondent denied that claimant suffered personal injury by accident which arose out of and in the course of his employment with respondent. Having determined that claimant failed to provide timely notice in this matter, the ALJ did not mention those issues in her Order of December 10, 2010.

was terminated.[3] At no time prior to claimant's termination did claimant advise Mr. Katz that claimant was having any difficulties physically or that he had suffered any work-related injuries.

Mr. Katz testified that respondent posted information on its bulletin board on how to file a workers compensation claim. This information was posted in the job trailer and was in both English and Spanish.

Claimant's Application For Hearing, Form K-WC E-1 (E-1), was filed with the Division of Workers Compensation on June 28, 2010.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[3] Claimant was terminated on May 24, 2010.

[4] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2009 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[8]

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[9]

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and the matter remanded to the ALJ for a determination of the issues not yet decided.

The ALJ determined that claimant had failed to provide timely notice of the alleged accident. However, no determination as to the appropriate date of accident was made. Notice of accident is required within 10 days of the accident. Without a determination as to the appropriate date of accident, timely notice cannot be determined.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] K.S.A. 44-520.

[9] K.S.A. 2009 Supp. 44-508(d).

[10] K.S.A. 44-534a.

CONCLUSIONS

The date of accident, pursuant to K.S.A. 2009 Supp. 44-508(d), has not been determined. Therefore, the number of days from the date of accident until the date that claimant provided written notice to respondent of the alleged accident cannot be determined. The ruling by the ALJ that claimant failed to provide timely notice of accident is reversed.

This matter is remanded to the ALJ for a determination of the issues not yet decided, including, but not limited to, the appropriate date of accident and the timeliness of claimant's notice of accident. The Board does not retain jurisdiction of this matter. Should the parties desire Board review of future decisions by the ALJ, the appropriate appeal must be filed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 10, 2010, should be, and is hereby, reversed with regard to the finding that claimant failed to provide timely notice of accident. This matter is remanded to the ALJ for a determination of all remaining issues.

IT IS SO ORDERED.

Dated this ____ day of February, 2011.

HONORABLE GARY M. KORTE

c: Chris A. Clements, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge